

333 CMR 11.00: RIGHTS OF WAY MANAGEMENT

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11.01: Purpose

The purpose of 333 CMR 11.00 is to promote the implementation of Integrated Pest Management (IPM) Techniques and to establish those standards, requirements and procedures necessary to minimize the risk of unreasonable adverse effects on human health and the environment associated with the use of herbicides to maintain rights-of-way and to establish a statewide and uniform regulatory process. 333 CMR 11.00 establishes procedures which guarantee ample opportunity for public and municipal agency review and input on right-of-way maintenance plans.

11.02: Definitions

For the purpose of 333 CMR 11.00, the following definitions shall apply.

Agricultural Area, shall refer to, but not be limited to, actively cultivated gardens, greenhouses, orchards, fields, pastures, and other areas where herbicides might impact adversely on the vegetation under cultivation or agricultural management.

Applicant, shall refer to any person representing federal, state or local governments or agencies, utilities, railroads, pipelines, that intend to maintain a right-of-way by the application of herbicide.

Ballast, shall refer to the coarse gravel or crushed rock onto which the ties, tracks and any switching, signaling and communication devices of a railroad are laid.

Broadcast, shall refer to any non-selective herbicide application technique which results in application to all vegetation within a target area.

Department, shall refer to the Department of Food and Agriculture.

Foliar Treatment, shall refer to any technique which applies herbicide to leaves of the target vegetation.

Inhabited Area, shall refer to, but not be limited to residences, schools, hospitals, parks and recreational facilities or other areas in which humans generally live, work or gather.

Low Pressure, shall refer to pressure under 60 psi.

Maps, shall refer to maps which are of such accuracy and scale, as determined by the Department, to provide sufficient detail so that sensitive areas can be delineated, or which show bench marks or other permanent structures located on the right-of-way which allow the delineation of sensitive areas.

11.02: continued

Person, shall refer to, but is not limited to, an individual, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or its political subdivision, administrative agencies, public or quasi-public corporation or body, or any other legal entity or its legal representatives, agent or assignee, or a group of persons.

Person aggrieved, shall refer to any person who, because of an act or failure to act by the Department may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in 333 CMR 11.00. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

Primary Recharge Area, that land area delineated by Zone II as defined in 310 CMR 24.06 or in such cases as when the primary recharge area has not been designated it shall be, in the interim, be defined as a one half mile radius from the public drinking water supply well unless otherwise determined by the Department of Environmental Protection.

Right(s)-of-Way (ROW), for the purpose of 333 CMR 11.00 shall refer to any roadway, or thoroughfare on which public passage is made and any corridor of land over which facilities such as railroads, powerlines, pipelines, conduits, channels or communication lines are located.

Selective Application, shall refer to the application of herbicide, in such a manner that the delivery to the target vegetation is optimized and delivery to non-target vegetation and the environment is minimized.

Sensitive Areas, shall refer to any areas, within rights-of-way, including but not limited to the following, in which public health, environmental or agricultural concerns warrant special protection to further minimize risks of unreasonable adverse effects:

- (a) within the primary recharge area of a public drinking water supply well;
- (b) within 400 feet of any surface water used as a public water supply;
- (c) within 100 feet of any identified private drinking water supply well;
- (d) within 100 feet of any standing or flowing water;
- (e) within 100 feet of any wetland;
- (f) within 100 feet of any agricultural or inhabited area.

Stem Treatment, shall refer to any technique including stump, basal, stem, injection, banding, frill, girdle and any other treatment which delivers herbicide at low pressure to the stump, base or stem of the target vegetation.

Target Vegetation, shall refer to any plant species which has the potential to interfere with the operation of the rights-of-way.

Touch-up Application, shall refer to limited application of herbicides following an initial treatment, which is necessary to achieve the desired vegetation control.

Vegetation Management Plan (VMP), shall refer to a long term management plan for the applicant's right-of-way system which describes the intended program for vegetation control over a five year period.

VMP Advisory Panel, shall refer to the Vegetation Management Plan Advisory Panel as set forth in 333 CMR 11.05(4).

Yearly Operational Plan (YOP), shall refer to the yearly operational plan which describes the detailed vegetation management operation for the calendar year consistent with the terms of the long term Vegetation Management Plan.

11.02: continued

Water Supply, shall refer to any raw or finished water source that is presently used, reserved for future use, or under investigation for future use by a public water system as defined in 310 CMR 22.02, or used as a source of private drinking water by one or more persons. This shall include all land and waters used as, or tributary to, a public water system except those exempted under 310 CMR 22.20.

Wetlands, with the exception of land subject to flooding shall refer to areas subject to protection under M.G.L. c. 131, § 40 which include the following areas as defined in 310 CMR 10.02(1)(a) - (c);

- (a) Any bank, the ocean
- any freshwater wetland, any estuary
- any coastal wetland, any creek
- any beach, bordering any river
- any dune, on any stream
- any flat, any pond
- any marsh, or any lake
- or any swamp
- (b) Land under any of the water bodies listed above
- (c) Land subject to tidal action

11.03: General Provisions

- (1) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way unless appropriately certified by the Department or unless appropriately licensed by the Department and working under the on-site supervision of an appropriately certified applicator.
- (2) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way except in accordance with a Vegetation Management Plan (VMP) and a Yearly Operational Plan (YOP) as approved by the Department. Such documents shall be available at the work site at all times during herbicide applications and be made available to the Department and municipal officials including the Conservation Commission and Board of Health upon reasonable request.
- (3) No person shall handle, mix or load an herbicide concentrate on a right-of-way within 100 ft. of a sensitive area.
- (4) The perimeter of any sensitive areas which are not readily identifiable on the ROW shall be appropriately marked prior to any herbicide applications. The precise method used in marking these areas shall be identified in the VMP.
- (5) No foliar application of herbicides shall be used to control vegetation greater than 12 ft. in height except for side trimming.
- (6) No herbicide shall be applied when the wind velocity is such that there is a high propensity to drift off target and/or during measurable precipitation.
- (7) No person shall apply herbicides by aircraft for the purpose of clearing or maintaining a right-of-way.
- (8) No touch-up applications shall be carried out except under the following conditions:
 - (a) Touch-up applications must occur within 12 months of the date of approval of the YOP.
 - (b) The Department, the Conservation Commission, the Board of Health, and Chief elected official of the municipality shall be notified by certified mail at least 21 days prior to any application.

11.03: continued

(c) No more than 10% of the initially identified target vegetation on the applicant's right-of-way in any municipality may be treated and the total amount of herbicide applied in any one year shall not exceed the limits specified by the label or Yearly Operational Plan.

(d) The Department may impose such additional restrictions or conditions on the use of herbicides as it deems necessary to protect public health and the environment.

(9) The Department will maintain mailing lists of individuals and groups desiring to obtain notices on various aspects of the Program.

11.04: Sensitive Area Restrictions(1) General

(a) No more than the minimum labelled rate of the pesticide product for the appropriate site, pest, and application method shall be applied.

(b) Herbicides applied in sensitive areas shall be applied selectively by low pressure foliar techniques or stem application.

(c) No person shall apply herbicides for the purpose of clearing or maintaining a right-of-way in such a manner that results in drift to any area within ten feet of standing or flowing water in a wetland or area within 400 feet of a public drinking water supply well; or area within 100 feet of any surface water used as a public water supply; or area within 50 feet of a private drinking water supply identified in accordance with 333 CMR 11.04(2)(c)(3).

(d) The Department, in cooperation with the Department of Environmental Protection, and subject to a Memorandum of Understanding will evaluate herbicides currently registered for use on rights-of-way and will distribute a list of herbicides recommended for use in sensitive areas and guidelines for their use. The Memorandum of Understanding will set forth a procedure for this evaluation based on all available data relative to environmental fate and toxicity. Such list, guidelines and procedures will be subject to review and comment by the Department of Public Health provided that such comments are provided to the Department within a reasonable time. The Department, on August 15 of the calendar year, will make available the list and guidelines to applicants and to the VMP Advisory Committee. Applicants proposing to use an herbicide which has been registered for use on rights-of-way but has not yet been evaluated pursuant to the provisions of the Memorandum of Understanding may request that such herbicides be evaluated pursuant to said provisions. For an herbicide which has been evaluated pursuant to the provisions of the Memorandum of Understanding, applicants proposing to use such herbicide in a manner inconsistent with the terms and conditions of use imposed in the guidelines may request a modification or waiver of such terms or conditions. A request for such modification or waiver shall provide a detailed rationale for use, including all relevant data including but not limited to environmental fate, efficacy and human health effects of the proposed herbicide. Such herbicides and/or uses shall be subject to the evaluation standards adopted by the Departments of Food and Agriculture and Environmental Protection in the Memorandum of Understanding.

Commentary

Applicants subject to the provisions of the Wetlands Protection Act, who wish to apply pesticides registered for use in Massachusetts to rights-of-way, may choose to apply herbicides determined to be suitable for use in sensitive areas in accordance with the provisions of the Memorandum of Understanding mentioned above or, alternatively, applicants may proceed pursuant to the provisions of 310 CMR 10.00 as authorized by M.G.L. c. 131, § 40.

11.04: continued

(e) The Department may impose such additional restrictions or conditions on the use of herbicides within or adjacent to sensitive areas as it determines necessary to protect human health or the environment. Such changes may be proposed by a municipal agency or individual during the public comment period.

(2) Water Supplies

(a) Public Ground Water Supplies

1. No herbicides shall be applied within 400 feet of any public ground water supply well.
2. No herbicides shall be applied within the primary recharge area of a public ground water supply well except under the following conditions:
 - a. A minimum of 24 months shall elapse between applications; and
 - b. Herbicides shall be applied selectively by stem application or low pressure foliar techniques.

(b) Public Surface Water Supplies

1. No herbicide shall be applied within 100 feet of any surface water used as a public water supply.
2. No herbicide shall be applied between 100 feet and 400 feet of any surface water used as a public water supply except under the following conditions:
 - a. A minimum of 24 months shall elapse between applications; and
 - b. Herbicides shall be applied selectively by low pressure foliar techniques or stem application.

(c) Private Drinking Water Supplies

1. No herbicide shall be applied on or within 50 feet of any private drinking water supply identified in accordance with 333 CMR 11.04(2)(c)(3).
2. No herbicide shall be applied between 50 feet and 100 feet of any private drinking water supply identified in accordance with 333 CMR 11.04(2)(c)(3) except under the following conditions:
 - a. A minimum of 24 months shall elapse between applications; and
 - b. Herbicides shall be applied selectively by low pressure foliar techniques or stem application.
3. It shall be the responsibility of the applicant to adhere to the sensitive area restrictions around identified private wells. The applicant shall consult with the Department to identify private wells that are located within 100 feet of the rights-of-way. The Department shall request the location of private wells along the right-of-way from the Department of Environmental Management and local Boards of Health. Wells identified to be within 100 feet shall be kept on file by the applicant for delineation on the maps in the YOP and be listed in the YOP. The VMP must include the method of locating identified private wells in the field prior to the application of herbicides.

(3) Surface Waters

- (a) No herbicide shall be applied on or within ten feet of any standing or flowing surface water which is not a public water supply. No herbicides shall be applied between ten feet and 100 feet of any standing or flowing surface water which is not a public water supply except under the following conditions:
1. A minimum of 12 months shall elapse between application; and
 2. Herbicides shall be applied selectively by low pressure foliar techniques or stem application.

(4) Wetlands

- (a) No herbicide shall be applied on or within ten feet of a wetland.
- (b) No herbicide shall be applied between ten feet and 100 feet of a wetland except under the following conditions:
1. A minimum of 12 months shall elapse between applications; and
 2. Herbicides shall be applied selectively by low pressure foliar techniques or stem application.

11.04: continued

(c) Notwithstanding 333 CMR 11.04(4)(a), public utilities providing electric, gas, water, telephone, telegraph and other telecommunication services may apply herbicides on or within ten feet of a wetland in accordance with the following conditions:

1. Submission of a study, the design of which is subject to prior approval by the Departments of Food and Agriculture and Environmental Protection, evaluating impacts of proposed vegetation management programs on wetlands; and
2. A finding by the Department, after consultation with the Advisory Committee, that the proposed vegetation management program will result in less impacts to the wetland than mechanical control.
3. Notwithstanding the above, no herbicides shall be applied on or within ten feet of any standing or flowing water in a wetland.

(5) Inhabited and Agricultural Areas

(a) No high pressure foliar herbicide applications shall be carried out within 100 feet of any inhabited area or any agricultural area during the growing season.

(b) No foliar herbicide shall be applied within 100 feet of any inhabited area or any agricultural area during the growing season except under the following conditions:

1. A minimum of 12 months shall elapse between applications; and
2. Herbicides shall be applied selectively by low pressure foliar techniques or stem application.

11.05: Vegetation Management Plan (VMP)(1) General.

(a) Unless otherwise specified by the Department, all VMPs should be submitted by the applicant no later than September 1 prior to the calendar year of the proposed first year of maintenance. All approved VMPs shall take effect on January 1 unless otherwise specified by the Department, and shall be effective for a five year period unless otherwise modified, or revoked by the Department.

(b) The VMP shall be presented on forms and/or format approved by the Department.

(2) Requirements. The VMP shall include but not be limited to the following:

- (a) General statement of goals and objectives of the VMP.
- (b) Identification of target vegetation.
- (c) Intended methods of vegetation management and rationale for use, including vegetation control techniques, equipment proposed for use and timing of applications and alternative control procedures.
- (d) Justification of herbicide applications proposed.
- (e) Methods, references and sources for identifying sensitive areas and control strategies proposed for sensitive areas.
- (f) Operational guidelines for applicators relative to herbicide use.
- (g) Identification and qualifications of individuals developing and submitting a plan.
- (h) A description of Integrated Pest Management Programs or other techniques/programs to minimize the amount and frequency of herbicide application.
- (i) Description of alternative land use provisions or agreements that may be established with individuals, state, federal or municipal agencies that would minimize the need for herbicide, including the rationale for accepting or denying any reasonable request made by any individual.
- (j) Remedial plan to address spills and related accidents.

(3) Public Notice, Review and Comment.

(a) Upon receipt of the proposed VMP, the Department shall schedule and hold appropriate regional public hearings affording all interested parties the opportunity to comment on the proposed plan.

(b) At least 21 days prior to the public hearings, the Department shall publish notice of the hearings in the Environmental Monitor and regionally located newspapers, and send notice to municipalities covered by the plan and to the appropriate mailing list. The notice will include locations where copies of the VMP can be reviewed.

11.05: continued

(c) The public shall have no less than 45 days, starting from publication of the Environmental Monitor notice, to comment upon proposed VMPs, unless the Department extends the comment period for good cause.

(d) At least 21 days prior to the end of the public comment period, the applicant shall send a copy of the proposed VMP to the chief elected official, the Board of Health and the Conservation Commission in affected communities upon their request.

(4) VMP Advisory Panel.

(a) There shall be a VMP Advisory Panel charged with the responsibility of reviewing Vegetation Management Plans and the accompanying public comments. The Panel shall recommend approval, denial or modification to the Department.

(b) The Panel shall consist of the Commissioner(s) or designees of the following Departments:

Department of Food and Agriculture, non-voting

Department of Environmental Protection

Department of Public Health

Department of Public Works and

Division of Fisheries and Wildlife, Natural Heritage Program

a representative appointed by the Commissioner of

DFA from each of the following groups:

Massachusetts Association of Conservation
Commissions;

Massachusetts Association of Health Boards;

University of Massachusetts/Extension Service;

railroads;

utilities;

applicator; and an

environmentalist

A member shall be appointed for a term of one, two or three years. Appointed members shall serve at the discretion of the Commissioner. No member shall serve more than six consecutive years. Appointed panel members shall serve without compensation and shall not be reimbursed for any expenses incurred by them in the performance of their duties. The Commissioner of the Department or designee shall serve as an ex officio non-voting member to the VMP Advisory Panel.

(c) The Department of Food and Agriculture's Representative shall chair the VMP Advisory Panel. This chairperson shall coordinate efforts of the Department and the Panel to process the VMPs.

(d) The VMP Advisory Panel shall conduct business in accordance with the time, place and procedures agreed upon.

(e) The VMP Advisory Panel shall review all complete VMPs including all written and public hearing comments. The Advisory Panel may, if necessary, request from the applicant additional information. Within 30 days of the end of the comment and review period, unless extended for good cause, the VMP Advisory Panel shall recommend to the Department in writing approval, denial or modification of each VMP.

(5) Disposition of VMP.

(a) 30 copies of the proposed VMP shall be submitted to the Department. The Department shall distribute copies of the proposed VMP to each member of the Advisory Panel.

(b) Within 30 days of the end of the public comment period unless extended for good cause, the VMP Advisory Panel shall review the VMPs and recommend in writing to the Department approval, denial or modification of each VMP; if necessary, the Panel may request from the applicant additional information.

(c) Within 21 days of the end of the VMP Advisory Panel review period, unless extended by the Department for good cause, the Department will notify the applicant and the Advisory Panel in writing one of the following:

1. request for additional information or modification; or
2. denial of VMP; or
3. approval of VMP.

11.05: continued

- (d) The VMP may be modified, withdrawn or amended by the applicant through a written request sent by certified mail to the Department.
- (e) Resubmission of a denied VMP, updating of a VMP, or a significant amendment to an approved VMP shall be processed according to 333 CMR 11.05.
- (f) The applicant must send a copy of the approved VMP to the chief elected official, Board of Health, and Conservation Commission in each municipality covered by the plan.

(6) Time for Action. Non action on a Vegetation Management Plan within time specified herein does not constitute approval of the submitted plan. In the event that the Department fails to notify the applicant of a decision within the time specified above and upon written request from the applicant, the Commissioner must issue a finding within ten days of receipt stating the reason for the delay and providing an estimated completion date.

11.06: Yearly Operational Plan (YOP)(1) General.

- (a) The applicant is responsible for the accuracy and completeness of all information submitted with the YOP. The YOP shall be consistent with the objectives of the VMP and shall describe the intended operational program for that calendar year.
- (b) The YOP shall be presented on forms and/or format approved by the Department.

(2) Requirements. The YOP shall include but not be limited to the following:

- (a) Maps locating the ROW and Sensitive areas not readily identifiable in the field.
- (b) Herbicides proposed including application rates, carriers, adjuvants.
- (c) Herbicide application techniques and alternative control procedures proposed.
- (d) The company which will perform any herbicide treatment.
- (e) Identification of target vegetation.
- (f) Individual representing applicant supervising YOP.
- (g) Flagging methods to designate sensitive areas on the ROW.
- (h) Herbicide Fact Sheets as approved by the Department.
- (i) Procedures and locations for handling, mixing and loading of herbicide concentrates.

(3) Public Notice, Review and Comment.

- (a) Upon submittal of the YOP for approval, the Department will publish a notice in the Environmental Monitor. Said notice shall be provided by the applicant and shall include the information on the municipalities through which the rights-of-way pass, a brief description of the intended program, and the procedure for public review and comment. The Department will distribute copies of the Environmental Monitor notice to the appropriate mailing list and the applicant.
- (b) The applicant shall provide by certified mail under separate cover to the Board of Health, Conservation Commission and chief elected municipal official a copy of the proposed YOP and the Environmental Monitor notice for the city or town in which the herbicide treatment is proposed. The applicant shall maintain copies of the packet sent to municipalities and certified mail receipts as part of the recordkeeping requirements, 333 CMR 10.15.
- (c) The Department shall allow a 45 day comment period on proposed YOPs, unless extended for good cause, commencing with the publication of the notice in the Environmental Monitor and receipt of the proposed YOP and Environmental Monitor notice by each municipality.
- (d) The Department may approve, deny or modify YOPs after the 45 day comment period has expired.

(4) Disposition of YOP.

- (a) The YOP shall be submitted by the applicant to the Department at least 90 days prior to the proposed commencement of application to allow completion of the comment period and review.
- (b) The Department shall review the YOP to ensure that the YOP is consistent with the approved VMP. Any inconsistencies or deficiencies will be noted by the Department and returned to the applicant.

11.06: continued

(c) Where practical, the Department shall approve or deny the YOP within 90 days of receipt. The Department will provide notice of the decision to the applicant, municipal agencies and commentators in writing.

(d) The approved YOP in conjunction with the VMP shall govern the application of herbicide for a period not to exceed 12 months in accordance with other laws and regulations of the State and Federal governments and impose such conditions as necessary to minimize the risk of adverse effects on human health and the environment.

(5) Time for Action. Non action on a Yearly Operational Plan within the time specified herein does not constitute constructive approval of the submitted plan. In the event that the Department fails to notify the applicant of a decision within the time specified above and upon a written request from the applicant the Commissioner must issue a finding within ten days of receipt stating the reason for the delay and providing an estimated completion date.

11.07: Public Notification

The applicant shall provide by certified mail under separate cover, at least 21 days in advance of the application of herbicide to the right-of-way, a notice to the Department and to the Mayor, City Manager or Chairman of the Board of Selectman, the Board of Health, and the Conservation Commission in the municipality where the right-of-way lies. The notice shall include but not be limited to the approximate date on which such spraying shall occur, provided however, that said spraying shall not conclude more than ten days after said approximate date; a copy of a DFA approved Herbicide Fact Sheet on the active ingredient(s) of the herbicide(s) used; the name and address of contractor who will make the application or the name of the certified employee who will make the application.

This notice may run concurrently with the public notice and comment period in 333 CMR 11.06(3) provided the application is made after the close of the public notice and comment period and all modifications to the YOP are made before the application takes place and approval is granted by the Department.

11.08: Notice of Modification and Revocation

(1) The Department may suspend approval of any VMP or YOP, by written notice to the applicant and applicator, halting the application of herbicide to that right-of-way of the above mentioned YOP. After 21 days if the applicant does not request a hearing, the Department may revoke or modify the VMP and YOP, if it finds:

- (a) that the terms, conditions of restrictions thereof, are being violated or are inadequate to avoid unreasonable adverse effects on the environment or on human health; or
- (b) that the applicant has made a false or misleading statement in the VMP or YOP; or
- (c) that the applicant has violated any provision of the Massachusetts Pesticide Control Act or FIFRA, or any regulations, standards, orders or license issued under either.

(2) Upon notice of revocation or modification, the applicant may modify the YOP by written request to the Department. Applications to modify the YOP shall be submitted in the manner set forth in 333 CMR 11.06 and disposed of in the manner set forth in 333 CMR 11.06. The Department may waive all or part of the requirement if it determines that the proposed changes do not significantly change the terms of the approved YOP.

11.09: Rights of Appeal

Any person aggrieved by the decision of the Department to approve, deny, modify or revoke a Vegetation Management Plan or a Yearly Operational Plan may request an adjudicatory hearing. The request for a hearing must be sent to the Department by Certified mail or hand delivered within 21 days after the date of decision or notice by the Department. At the same time the request for a hearing must be sent by Certified mail or hand delivered to the applicant and the Pesticide Board. The request should state clearly and concisely the facts of the proceeding, the reasons the decision is alleged to be inconsistent with 333 CMR 11.00 and the relief sought by the adjudicatory hearing. The adjudicatory hearing before the Pesticide Board shall be conducted as set forth in M.G.L. c. 30A and M.G.L. c. 132B, § 13.

11.10: Penalties

Any person who violates any provision of 333 CMR 11.00 shall be subject to the criminal and civil penalties set forth in M.G.L. c. 132B, § 14.

REGULATORY AUTHORITY

333 CMR 11.00: M.G.L. c. 132B.